

Criticizing the new President of the Polish Constitutional Court: A Crime against the State?

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L'état c'est moi. Thus said France's Louis XIV, and thus seems to think of herself Julia Przyłębska – since the 2016 “coup” against the Constitutional Court in Poland, she is the President of that Court, de facto appointed to the post by the man who runs Poland these days, Jarosław Kaczyński. Last October a Polish oppositional daily, *Gazeta Wyborcza*, described how she allegedly colluded with the Polish State security in the pursuit of her position at the Constitutional Court. Przyłębska tried to defend herself by using criminal-law instruments otherwise designed to protect the State. “By attacking me, you attack the State,” she seems to suggest.

“*Gazeta Wyborcza*” did not refer to her as the President of the Court, merely describing her career path. Przyłębska decided to lodge a motion to the prosecutor's office (*prokuratura*), based on an article of the Polish Criminal Code, stating that this newspaper text has insulted one of the constitutional organs of Poland. And yet the text did not deal with the Constitutional Court as such, concentrating instead on the personality and professional career of Przyłębska. It did not assess her performance as a judge, nor did it refer to her public duties. But for the President of the Constitutional Court this is *minutiae*. She equals her good name and reputation to that of the State and its institutions. *L'état c'est moi!*

The invoked article 226 par. 3 of the Criminal Code is rarely applied. According to this provision a person found guilty of “publicly insulting or humiliating a constitutional authority” can incur a punishment of up to two years of imprisonment. The aim of the provision is to protect the public image and the good name of constitutional organs, including courts and tribunals. The jurisprudence and the doctrine are clear: Protection is granted to institutions and not to the individuals employed in those institutions. The only exception is a public comment, which concerns all of the constitutional authorities employees, e.g. insults targeting all of the Constitutional Court judges. In 2015, the Constitutional Court ruled that article 226 par. 3 is compatible with the Constitution, particularly its provisions relating to freedom of expression.

The motion lodged by Przyłębska raises public concerns in Poland and should be analysed in the context of international standards of protection of the reputation of judges, of standards referring to freedom of expression and criticism of State institutions. Finally, Przyłębska's behaviour may be degrading democratic institutions in Poland.

Protection of the reputation by a judge

The motion lodged by President of the Court appears contrary to the standards established by the European Court of Human Rights. Actions seeking protection of reputation of members of judiciary deserve a special scrutiny, and circumstances such

as the formulation of criticism in public interest must be taken into consideration. Although for expressions directed against judges, the Court has favored less protection and leaves a large margin of appreciation to the State, it has always adjudicated in cases where judges were seeking protection based on civil or criminal defamation laws. In the present case, despite legal means to protect her reputation, Przyłębska decided to open proceedings as if she herself was a constitutional organ, and not in her personal capacity.

In *De Haes and Gijssels v. Belgium* the Court recognized that members of the judiciary must enjoy public trust and therefore they must be protected against destructive attacks lacking any factual basis. Moreover, since they are subject to a duty of maintaining confidentiality, judges cannot publicly respond to various attacks, as, for instance, can the politicians. In that case however, the contentious newspaper texts were criticizing the work of two judges of the court of appeals adjudicating in divorce cases. The ECtHR found that the civil defamation case against Belgian journalist was disproportionate. The articles were part of an ongoing public debate on incest and on how the judiciary had dealt with the issue. Similarly in the case under discussion here, the career paths and personalities of the Constitutional Court judges appointed during the constitutional crisis in Poland by the ruling party, seem of vital importance and are under much debate. In the case *Maciejewski v. Poland* the ECtHR emphasized that in principle, the defamation of a judge by the press takes place as part of a debate on the malfunction of the judicial system or in the context of doubting the independence or impartiality of judges. Such issues are always important to the public and must not be kept outside of the public debate, in particular in a country experiencing the transition to an independent and effective judiciary.

Protection of State institutions and freedom of expression

The OSCE, the Inter-American and U.N. systems, have stated on many occasions that “[t]he State, objects such as flags or symbols, government bodies, and public authorities of all kinds should be prevented from bringing defamation actions”.

The UN Special Rapporteur on Freedom of Expression has further expressed the view that “international human rights law protects individuals and groups of people, not abstract notions or institutions that are subject to scrutiny, comment or criticism”. For its part, the UN Human Rights Committee has stated that “States parties should not prohibit criticism of institutions, such as the army or the administration”.

Also according to the ECtHR case law, article 226 par. 3 of the Polish Criminal Code raises doubts and seems incompatible with the freedom of expression standards. The ECtHR in the case *Castells v. Spain* established a standard according to which, the limits of permissible criticism are wider with regard to the government and state institutions than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the state institutions must be subject to a close scrutiny of the press and public opinion. Furthermore, the dominant position which the Government and state institutions occupy makes it necessary for them to display restraint in resorting to

criminal proceedings, particularly when other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. The ECtHR in the case *Romanenko and others v. Russia* acknowledged “that there may be sound policy reasons to decide that public bodies, should not have standing to sue in defamation in their own capacity”. Some European jurisdictions, such as the United Kingdom, have eliminated from their legal systems the possibility for protection of reputation by state institutions.

Democratic crisis in Poland

The motion to the prosecutor’s office lodged by the President of the Constitutional Court Przyłębska seems even more reprehensible in a country where the ruling party has taken over control one after another of the major state institutions such as the Constitutional Court, the prosecutor’s office and currently the Supreme Court and the judiciary. A law from early 2016, makes the prosecutors dependent on the Minister of Justice, himself an active politician and member of the ruling party. The February 2016 Act on the public prosecutor’s office – merging the role of Prosecutor General with the post of Minister of Justice – was criticized by a number of international institutions, including the European Commission within the framework of the rule of law procedure opened in July 2016 against Poland. The reaction to the motion of the politically dependent members of the office of the prosecution may be easily anticipated.

Using state instruments and public prosecution to protect the reputation of individual judges carries a strong message. Everyone attempting to criticize the newly selected judges of the Constitutional Court would face criminal responsibility. Such actions seem mostly aimed at chilling the debate around the politicization of the Constitutional Court. Facing such a grave responsibility journalists would slowly refrain from participating in this highly heated debate of public interest.

After more than a year of permanent attacks on democratic institutions in Poland, Przyłębska’s motion comes as another such attempt. As stated above, Article 226 par. 3 was rarely used in the past. The motion lodged by the President of the Constitutional Court in Poland may serve as a dangerous precedent, encouraging politicians and officials to use state mechanisms at their own will, and in a self-serving fashion.

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